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No. 73-690

In the Supreme Court of the United States

OCTOBER TERM, 1973

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO, PETITIONER

v.

WESTERN ALFALFA CORPORATION

ON WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS, DIVISION II

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the issuance of an administrative order that respondent cease and desist from violating the state air pollution law violated respondent's rights under the Fourth or Fourteenth Amendments because the order was based on a state air pollution inspector's unannounced observation, while standing on respondent's outdoor premises without a search warrant, of the discharge from respondent's smoke stacks.

INTEREST OF THE UNITED STATES

The Clean Air Act Amendments of 1970 impose upon the United States, through the Environmental Protection Agency, the responsibility for assuring that certain air quality standards are achieved and maintained in the United States, 42 U.S.C. 1857. Under the Act, these standards are to be achieved primarily by means of state implementation plans (see n. 12, *infra*). The Administrator of the EPA has encouraged vigorous and effective state enforcement of the state implementation plans; and, if any state fails to enforce its plan, he has the authority to enforce it. 42 U.S.C. 1857c–8(a)(2). The rationale of the decision below would impede state efforts to assure compliance with the federal air standards by limiting the methods used to determine compliance with those standards.[1]

[1] More broadly, the reasoning of the Colorado court casts doubt on procedures for enforcement of other statutes designed to protect the environment from pollution. *E.g.*, the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. II) 1251, *et seq.*, and the Noise Control Act of 1972, 42 U.S.C. (Supp. II) 4901, *et seq.* It may also cast doubt on the provisions in the Federal Coal Mine Health and Safety Act of 1969 and the Federal Metal and Nonmetallic Mine Safety Act which grant safety inspectors the right to enter mines subject to those Acts (30 U.S.C. 813(b), 30 U.S.C. 724), as well as on numerous other federal statutes which grant limited rights of inspection to assure compliance with various health and safety standards. See, *e.g.*, 21 U.S.C. 374 (Federal Food, Drug, and Cosmetic Act); 7 U.S.C .(Supp. II) 136g (Federal Environmental Pesticide Control Act of 1972); 29 U.S.C. 657(a)(1) (Occupational Safety and Health Act of 1970); 42 U.S.C. 263i(a) (Radiation Control for Health and Safety Act of 1968).

STATEMENT

The states have promulgated plans to implement ambient air quality standards. These plans typically limit the discharges permitted from air pollution sources in two ways: by specifying limits on the density of emissions (opacity standards), and by specifying limits on the concentrations of particulates by weight per hour or per unit volume of the gases emitted (concentration/mass standards). The concentration/mass standards are not concerned with the size of the matter emitted; that is, large quantities of sub-micron size particles give the same result as far fewer, larger particles, although the sub-micron sized particles may constitute a greater health hazard. Opacity standards do discriminate according to the size of the matter emitted. Moreover, since opacity standards are monitored simply by observations by trained observers, while monitoring compliance with concentration/mass standards requires the installation of testing devices in the stack of the air pollution source being tested, compliance with the former can be more easily checked. Therefore, the use of opacity standards provides a more economical enforcement technique and hence greater assurance that pollution control equipment will be properly maintained and utilized.

In the present case, after almost two years of negotiations attempting to bring emission sources at three Western Alfalfa plants into compliance with emission standards (App. 23), a field inspector for the Colorado

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Department of Health entered the outdoor premises of the plants on June 4, 1969, to conduct a Ringelmann opacity test for determining the amount of particulate matter in the smoke plumes.[2] His entry was authorized by state law (Colo. R. S. 66–29–8(2)(d) (1967 Supp.)).[3] The inspector's readings showed that the emissions from all but one of the nine stacks at the three plants were substantially in excess of the levels permitted by the state law.[4]

Based on these opacity readings, the State Department of Health issued an order to Western Alfalfa on June 16, 1969, directing the company to cease and desist from further violation of the state air pollution control law. Western requested a hearing before the Air Pollution Variance Board at which it denied that it was in violation of the state standards. It attempted to demonstrate its compliance by evidence of opacity tests made in 1968 under the operating conditions

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[2] The Ringelmann test, prescribed by Colorado law, Colo. R. S. 66–29–5 (1967 Supp.), required a specially trained inspector to stand in a position where he has an unobstructed view of the smoke plume, observe the smoke, and rate it according to the opacity scale of the Ringelmann chart.

[3] The Colorado law was subsequently substantially revised. Colo. R. S. 66–29–8(2)(d) (1969 Supp.). The revised statute was later replaced by Colo. R. S. 66–31–10(2)(d) (1971 Supp.).

[4] Colorado law prohibited smoke emissions which, for more than three minutes, exceed 40 percent opacity, *i.e.*, number 2 on the Ringelmann chart, Colo. R. S. 66–29–5 (1967 Supp.). The inspector's readings showed 90 percent opacity at two dryer stacks, and 85 percent opacity at the third. Opacity at two grinder stacks was 70 percent, and 50 percent at the third. Two pelletizing stack emissions showed 50 percent opacity; the third showed 40 percent opacity (App. 24–25).

which prevailed on June 4, 1969, and a test of the concentration of solid particulate matter in the smoke plumes made after the inspector's June 1969 tests (App. 56, 75). The Board concluded that the particulate matter concentration tests did not comply with the statute then in effect,[5] and found on January 31, 1970, that Western Alfalfa's "operations are in violation of the [state] emission standards." It denied a variance from those standards (Pet. App. E4).

On Western Alfalfa's petition for review, the Colorado District Court for Weld County set aside the Board's decision, concluding that the Board's hearing denied Western Alfalfa due process, in that the observations of the state expert were made in secret and the company was not aware they had been taken until the cease and desist order was issued some twelve days later (Pet. App. F4).

The Colorado Court of Appeals, Division II, affirmed the judgment of the district court (Pet. App. A5). The court of appeals held that, because the inspector had entered the premises of Western Alfalfa without the knowledge or consent of anyone from the corporation, "the hearing afforded Western [by the Variance Board] lacked the fundamental elements of due process of law, since the secret nature of the investigation foreclosed Western from putting on any

[5] The Colorado statute at that time permitted the use of alternative tests to demonstrate compliance with air purity standards if the responsible state agency approved them, and found there was a reasonable correlation between opacity and the concentration of particulates in the emissions from the particular source being tested. Colo. R. S. 66–29–5(2)(e) (1969 Supp.).

rebuttal evidence" (Pet. App. A4). The court also concluded that "the act of conducting tests on the premises of Western without either a warrant or the consent of anyone from Western, constituted an unreasonable search" (*ibid.*).

After the Colorado Supreme Court denied the Board's petition for a writ of certiorari (Pet. App. B2), the Board's petition for certiorari in this Court was granted.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 114(a)(2) of the Clean Air Act Amendments of 1970, 42 U.S.C. 1857c–9(a)(2), gives the federal Administrator of the Environmental Protection Agency, or his authorized representative, the right to enter premises where there is any emission source upon presentation of his credentials, in order to inspect monitoring equipment or sample emissions.[6] Section 308(a)(4)(B) of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 858,

[6] Section 114(a)(2) provides:

> the Administrator or his authorized representative, upon presentative of his credentials—
>
> (A) shall have a right of entry to, upon, or through any premises in which an emission source is located or in which any records required to be maintained under paragraph (1) of this section are located, and
>
> (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which the owner or operator of such source is required to sample under paragraph (1).

33 U.S.C. (Supp. II) 1318(a)(4)(B), contains a virtually identical provision.[7] The legislative history of the Clean Air Act sheds little light on the entry provisions in that Act, but the Senate report on the Water Act contains the following comment:

> As under the Clean Air Act, the Committee expects the authority to enter will be used judiciously and upon any challenge to entry the Committee expects the Administrator to obtain the necessary warrant. [S. Rep. No. 92–414, 92d Cong., 1st Sess., p. 63.[8]]

Federal inspectors must, therefore, make their entry onto private property known and obtain a warrant if their entry is opposed.[9]

Several state statutes, however, authorize state officials to enter private premises without a warrant to conduct tests to ascertain whether air purity standards are being violated. For example, the California statute provides that any person who "in any way denies, obstructs, or hampers such entrance" is guilty of a misdemeaner (Cal. Ann. Health & Safety Code

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[7] Similar provisions are contained in the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 813(b)), and the Federal Metal and Nonmetallic Mine Safety Act (30 U.S.C. 724), as well as numerous other federal statutes, *e.g.*, 15 U.S.C. 1270(b) (Federal Hazardous Substances Act); 15 U.S.C. 1401(b) (National Traffic and Motor Vehicle Safety Act of 1966); 29 U.S.C. 657(a)(1) (Occupational Safety and Health Act of 1970).

[8] There is no suggestion in the legislative history of either Act that Congress intended to impose similar restrictions on the states.

[9] The federal statutes, in our view, do give a federal inspector the right to enter after identifying himself in the absence of an express objection.

§ 24246).[10] Other states have statutes which are in terms similar to the federal statute.[11] The *amicus curiae* brief in support of the petitioner filed on behalf of thirty-four states indicates (pp. 4–5) that many of them do not believe their statutes require either consent to entry or a warrant.

The decision of the Colorado court of appeals, by holding that the unconsented entry here constituted an unreasonable search of the sort this Court held violative of the Fourth Amendment in *Camara* v. *Municipal Court,* 387 U.S. 523, and *See* v. *City of Seattle,* 387 U.S. 541, thus casts doubt on the constitutionality of these state statutes as so interpreted, and of inspections conducted under them where neither a warrant nor express consent has been obtained. Its rationale, therefore, would seriously impede the efficient

[10] The Florida statute (Fla. Stats. Ann. § 403.091) provides that no person "shall obstruct, hamper or interfere with any such inspection"; Georgia law requires that the "owner, managing agent or occupant of any such property shall permit such entry" (Ga. Code Ann. § 88–907).

[11] State statutes do not generally require the inspector to present his credentials, as does the federal statute. See, *e.g.*, Del. Code, title 7, § 6203 (1970 Supp.); Hawaii Rev. Stats., title 19, § 322–64; La. Rev. Stat. Ann. 40:2204; N.J. Stats. Ann. 26:2C–9; N.Y. Environmental Conservation Law § 19–0305; Penna. Stats. Ann., title 35, § 4004. Thus, although the failure to object when the inspector presents his credentials should constitute sufficient consent to permit a federal inspection even under the Colorado court of appeals' analysis, unconsented entry of state inspectors into open areas pursuant to state laws not requiring them to identify themselves might not be permissible under that analysis.

enforcement of air pollution control statutes by the states.[12]

Thus, the rationale of the decision below may have a significant adverse effect on the enforcement of national air quality standards, even though the Colorado law under which the opacity readings at the

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[12] The states have primary responsibility to assure the maintenance of air quality standards. Section 107(a) of the Clean Air Act provides (42 U.S.C. 1857c-2(a)):

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Section 116 of the Clean Air Act, 42 U.S.C. 1857d-1, further provides:

> Except as otherwise provided in sections 209, 211 (c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

The Administrator's enforcement powers come into play only upon failure of the state to enforce its implementation plan. Section 113(a), 42 U.S.C. 1857c-8(a). Similarly, the states have primary responsibility to reduce water and noise pollution, under the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 859, 893, 33 U.S.C. 1251(b), 1319(a), 1370, and the Noise Control Act of 1972, 86 Stat. 1234, 42 U.S.C. 4901(a)(3).

Western Alfalfa plants were made was amended prior to the Air Pollution Variance Board hearing in this case, and subsequently repealed.[13] The new Colorado statute requires that the inspector obtain a warrant if the "entry or inspection is denied or not consented to, and no emergency exists" Colo. R. S. 66–31–10(2)(d) (1971 Supp.).

The limited entry here was not a search or seizure subject to the Fourth Amendment, since it did not invade any substantial privacy interest of the company. In any event, it was a reasonable means of enforcing the state's interest in clear air. Unlike the searches in *Camara* and *See,* there was here no attempt to enter the company's buildings, and, as in *United States* v. *Biswell,* 406 U.S. 311, the conduct regulated could be rapidly altered to avoid discovery of non-compliance while a warrant was being sought after a refusal of permission to enter.

There is no due process right to notice that observations are about to be made by a law enforcement officer, or to prompt notice that they have been made. Respondent was informed of the charges against him, cross-examined the inspector, and presented evidence

[13] Colo. R. S. 66–29–8(2)(d) (1969 Supp.). The repeal of the statute under which the cease and desist order issued does not render this case moot, since the current statute provides that "any person who shall violate any final cease and desist order * * * issued either pursuant to article 29 of chapter 66 prior to adoption of this article or pursuant to this article shall be subject to a civil penalty * * *". Colo. R. S. 66–31–19(1)(b) (1971 Supp.).

concerning his compliance with state air quality standards, which was the issue before the Board. No more was required. This Court has never suggested that there is a constitutional right to prompt notification that a law enforcement officer believes he has observed illegal conduct, much less a right of observation while the official investigates the legality of one's conduct. Although, on the facts of this case, we believe it would have been appropriate for the state inspector to notify respondent promptly when he completed his test, such notice is not required, by either the Constitution or the state statute.

ARGUMENT

I. STATE OFFICIALS MAY CONSTITUTIONALLY ENTER PRIVATE PREMISES TO CONDUCT SPOT CHECKS OF COMPLIANCE WITH AIR PURITY STANDARDS WITHOUT EITHER A WARRANT OR THE OWNER'S CONSENT

1. The limited entry here did not constitute a search or a seizure within the meaning of the Fourth Amendment.

The court below incorrectly held that the inspector's act of observing and evaluating the opacity of the emissions from Western Alfalfa's stacks while standing on Western Alfalfa's outdoor premises constituted a search subject to the Fourth Amendment. The observation and visual measurement of the smoke plumes involved no seizure of anything and did not in themselves impinge on any interest in privacy protected by the Fourth Amendment, since "[w]hat a person knowingly exposes to the public, even in his own home or

office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351. Moreover, in *United States* v. *Dionisio*, 410 U.S. 1, and *United States* v. *Mara*, 410 U.S. 19, this Court held that the circumstances in which the taking of handwriting exemplars, fingerprint samples, and voiceprints may be compelled are not limited by the Fourth Amendment because these acts involve "none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Dionisio*, *supra*, 410 U.S. at 15, quoting *Davis* v. *Mississippi*, 394 U.S. 721, 727. Cf. *Cardwell* v. *Lewis*, No. 72–1603, argued March 18, 1974. The observation of smoke plumes is, *a fortiori*, not a search.

Nor, in our view, was the state's conduct here inconsistent with this Court's determination that the administrative agency inspections involved in *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *City of Seattle*, 387 U.S. 541, were searches within the meaning of the Fourth Amendment. The health inspection of a private dwelling at issue in *Camara*, and the right to enter and conduct a fire inspection in a locked commercial warehouse asserted in *See*, involved far greater intrusions on privacy than an observation of a smoke plume after crossing a plant property line. Nothing in this record indicates that the inspector's entry was in any way impeded or that the public was in any way excluded from the area of the plant's outdoor premises which he entered. Indeed, his crossing of the property line was in a sense fortuitous, since it occurred only to enable him to observe the plumes from

the proper vantage point for a Ringelmann evaluation of them (see n. 15, *infra*). Since "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields" (*Hester* v. *United States*, 265 U.S. 57, 59), neither *Camara* nor *See* indicates that the inspection here was subject to the Fourth Amendment.

2. Even if this was a search subject to the Fourth Amendment, it was reasonable.

Unannounced, random spot checks of the opacity of smoke stack emissions are necessary to assure that state and federal air quality standards are maintained. Stack tests measuring particulate concentrations are expensive and time consuming to administer.[14] If such tests were the only means available for assuring compliance with applicable standards, only a limited number of sources could be tested. In addition, stack tests are inadequate to assure that emission control systems are properly maintained and constantly utilized, since emissions can easily be reduced if the operator knows a test is being conducted.

In contrast, the Ringelmann test requires only a trained observer with an appropriate view of the

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[14] EPA studies indicate that such tests may cost as much as $10,000 per test, and require approximately 300 man hours of technically skilled effort. 39 Fed. Reg. 9309; see Richard H. Schulze, *The Economics of Environmental Quality Measurement*, 23 Journal of the Air Pollution Control Association 671 (1973).

emissions for approximately half an hour.[15] Although this view may require that he enter company premises, it does not require any entry into buildings, or placing of equipment in company stacks.[16] As both courts below noted, the Ringelmann test has repeatedly been held to be an acceptable method for determining compliance with air quality standards (Pet. App. A2, F2–F3).

It is thus reasonable for a state to conclude that effective enforcement of air quality standards requires that inspectors be authorized to conduct unannounced inspections, even when entry onto the premises occupied by the emission source is necessary. Since the testing at issue here, the taking of opacity readings, does not involve entry into any building, there is at most only a minimal invasion of any privacy interest, which is substantially outweighed by the need to protect the public health by monitoring the quality of the air.[17] This is particularly true since the purpose of the

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[15] The EPA regulation for conducting an opacity test requires the qualified observer to stand at a distance equivalent to approximately two stack heights, but not more than a quarter of a mile from the base of the stack with the sun to his back, with a vantage point perpendicular to the plume. He must take at least 25 readings, recording the necessary data at 15 to 30 second intervals. 40 C.F.R. 60.85, Method 9.

[16] Moreover, although it may be necessary for an inspector to enter company premises in order to conduct the test, he can ascertain from observation outside the premises that the smoke plume is dense enough to make a test appropriate. Thus, he need enter private premises to conduct the test only when he has a reasonable basis to believe that a violation of the emission standards is occurring.

[17] In *Youghiogheny & Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio), a three-judge court held the warrantless inspec-

test may be frustrated by even brief notice that a test is to be taken, such as that inherent in the obtaining of consent to enter or presentation of a warrant. Visible emissions can be greatly reduced within minutes by bringing any existing control systems into operation, or by spraying water on dust, shutting down boilers, or by similar means. See 39 Fed. Reg. 9309.[18]

This case thus involves considerations similar to those held controlling in *United States* v. *Biswell,* 406 U.S. 311, with respect to inspections to enforce gun controls. The Court there explained the distinction between inspections of this type and those involved in *Camara* and *See* as follows (406 U.S. at 316):

> It is also apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment. In *See* v. *City of Seattle,* 387 U.S. 541 (1967), the mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or to correct in a short time.

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tion of a coal mine pursuant to 30 U.S.C. 813 to be a reasonable search which did not violate the Fourth Amendment. It balanced the owner's privacy interests against the state's interest in health and safety which required frequent unannounced inspections, and concluded that the state could authorize warrantless searches.

[18] A notice requirement would also seriously impede enforcement of noise emission standards under both the Noise Control Act of 1972, 86 Stat. 1234, *et seq.*, 42 U.S.C. (Supp. II) 4901, *et seq.*, and state and local noise abatement programs. Even more than air polution, noise is transitory, and noise emissions generally can be terminated or reduced within a few seconds.

> Periodic inspection sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system there at issue. We expressly refrained in that case from questioning a warrantless regulatory search such as that authorized by § 923 of the Gun Control Act. Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.[19]

Accordingly, we believe that in the circumstances here the states may reasonably conclude that unannounced warrantless inspections are necessary, and that if they do so conclude, the consent of those inspected is not a constitutional requirement. A different question might be presented if it appeared that the inspector had entered the company's building without identifying himself and obtaining at least tacit consent to the inspection, or even that he had entered company land from which the public is excluded. In such cases, there might be grounds for contending that there had been a substantial invasion of privacy which would present a more difficult problem in balancing the needs of the state against the privacy

[19] Food and drug inspections pursuant to 21 U.S.C. 374 were held to be analogous to the *Biswell*, rather than *Camara-See* inspections in *United States* v. *Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371 (D. Del.). See, also, *Terraciano* v. *Montanye*, C. A. 2, No. 73-2382, decided March 14, 1974.

interests of the company to determine whether the inspector's conduct was reasonable. Cf. *Youghiogheny & Ohio Coal Co.* v. *Morton,* 364 F. Supp. 45 (S.D. Ohio).[20] But here, as where an inspector enters a railroad right-of-way to determine whether standards established under the Noise Control Act of 1972, 42 U.S.C. (Supp. II) 4901, *et seq.,* are being violated, the land-owner's privacy interests are minimal, if they exist at all, and the state's interest in conducting unannounced spot checks is substantial.

II. THE COMPANY HAS NO DUE PROCESS RIGHT TO NOTICE THAT A READING IS BEING TAKEN

The Colorado court of appeals held, without citation of authority, that "it is constitutionally mandatory in this type of case that the party accused be aware of the taking of test and measurements on its premises at the time they are made" (Pet. App. A5). It based this holding on the belief that "the secret nature of the investigation foreclosed Western from putting on any rebuttal evidence * * * since the Board made it very clear that the only evidence which was probative of whether Western was in violation of the Act was evidence which would rebut the evidence of the alleged violation of June 4, 1969" (Pet. App. A4–A5).

This reasoning overlooks the fact that the issue before the Board was whether Western was currently in violation of the Act, and that it received from West-

[20] Indeed, if the test involves the placing of equipment in the company stacks, as it does for particulate concentration testing, the respective interests involved may indicate that a warrant requirement is appropriate.

ern the analysis of the emissions from its three plants made after the cease and desist order was issued (App. 82). This analysis was rejected, not because it did not refer to emissions on June 4,[21] but because the test utilized did not comply with the Act (Pet. App. E3). Thus, the Board was apparently willing to consider tests performed after the state inspector's readings, but the ones presented by respondent were simply inadequate. Therefore, the Board refused to modify the Health Department's order directing respondent to desist from further violations of the Air Pollution Control Act (App. 1–3). If, in fact, respondent was currently in compliance with the Act, as he contended (App. 59, 75–77), he could continue to operate his plants as he had been doing.[22]

Moreover, the state observer who made the Ringelmann readings testified at the hearing, and was extensively cross-examined by respondent (App. 20–39).[23] Respondent was, therefore, denied no right of confrontation protected by the Fourteenth Amendment. *Greene* v. *McElroy,* 360 U.S. 474, 496; *Goldberg* v.

[21] Nor was this evidence rejected because the Department of Health had not been notified that the test was being conducted (Pet. App. F3).

[22] Under Colo. R. S. 66–29–15 (1967 Supp.) (Pet. App. D 25), respondent would be guilty of a misdemeanor if it violated the statutory emission standards after the cease and desist order became final. Cf. Colo. R. S. 66–31–19 (1971 Supp.), assessing a substantial civil penalty for violation of a cease and desist order, and providing a lesser penalty for failure to comply with air purity standards in the absence of a cease and desist order.

[23] In addition, respondent introduced three photographs of the smoke plume taken by the state inspector when he made the readings (App. 31–32).

Kelly, 397 U.S. 254, 269; *Richardson* v. *Perales*, 402 U.S. 389, 410.[24]

The court of appeals stated that it is constitutionally necessary that respondent be aware that the readings are being taken "at the time they are made" (Pet. App. A5). Respondent disclaims, however, any contention that it was entitled to advance warning of the tests, and urges only that it should have been notified immediately *after* the test is taken (Brief for Respondent in Opposition to petition for writ of certiorari, pp. 9, 12, 14). For the reasons stated, however, we do not believe such notification is constitutionally required. State law might, of course, reasonably require that the inspector give prompt notice that a test has been conducted.[25] But whether such a requirement

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[24] The discharge of air contaminant of the opacity found by the inspector was a violation of Colo. R. S. 66–29–5(2) (1967 Supp.). This Court has never suggested that due process requires concurrent notice to a person whose illegal conduct is being investigated, or even that such notice must be given soon after the investigation is completed. Rather, it has recognized that even in criminal trials, the defendant has no such right. See *Wardius* v. *Oregon*, 412 U.S. 470, 475–476 n. 9.

[25] Several states do require that if samples of contaminated air are taken for analysis, a copy of the analytical report shall be furnished promptly to the person responsible for the contamination. (Colo. R. S. 66–31–10(2)(d) (1971 Supp.); Michigan Stats. § 336.15(i); N. J. Stats. Ann. § 26:2C–9(d); N. Y. Environmental Conservation Law § 19–0305(2)(a).

The Federal Coal Mine Health and Safety Act of 1969 gives "the authorized representative of the miners at the mine at the time of [the] inspection" the right to accompany the inspector (30 U.S.C. 813(h)), and requires the prompt issuance to the mine operator of any notices of violations resulting from such inspection (30 U.S.C. 814(f)). Other federal statutes require the presentation before inspection of written notice to the owner, operator, or

should be included is a matter for legislative, rather than judical, determination, and the Colorado law contains no such requirement.

CONCLUSION

The judgment of the Colorado court of appeals should be reversed.

Respectfully submitted.

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agent in charge of the premises to be inspected, *e.g.*, 42 U.S.C. 263i(a) (Radiation Control for Health & Safety Act of 1968); 7 U.S.C. (Supp. II) 136g(a)) (Federal Environmental Pesticide Control Act of 1972); 21 U.S.C. 374(a) (Federal Food, Drug, and Cosmetic Act).

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